



## 12 CFR Part 328

RIN 3064-AF71

### False Advertising, Misrepresentation of Insured Status, and Misuse of the FDIC's

#### Name or Logo

**AGENCY:** Federal Deposit Insurance Corporation.

**ACTION:** Notice of proposed rulemaking and request for information.

**SUMMARY:** The Federal Deposit Insurance Corporation is seeking comment on a proposed rule to implement section 18(a)(4) of the Federal Deposit Insurance Act.

Section 18(a)(4) of the Federal Deposit Insurance Act prohibits any person from making false or misleading representations about deposit insurance or from using the Federal Deposit Insurance Corporation's name or logo in a manner that would imply that an uninsured financial product is insured or guaranteed by the Federal Deposit Insurance Corporation. The proposed rule would describe: the process by which the Federal Deposit Insurance Corporation will identify and investigate conduct that may violate section 18(a)(4) of the Federal Deposit Insurance Act; the standards under which such conduct will be evaluated; and the procedures which the Federal Deposit Insurance Corporation will follow when formally and informally enforcing the provisions of section 18(a)(4) of the Federal Deposit Insurance Corporation Act.

**DATES:** Comments are due on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Comments on the Paperwork Reduction Act burden estimates are due on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** You may submit comments, identified by RIN 3064-AF71, by any of the following methods:

- **FDIC Website:** <https://www.fdic.gov/regulations/laws/federal/>. Follow instructions for submitting comments on the agency website.

- **FDIC Email:** [Comments@fdic.gov](mailto:Comments@fdic.gov). Include RIN 3064-AF71 on the subject line of the message.

- **Mail:** James P. Sheesley, Assistant Executive Secretary, Legal-ESS, Attention: Comments-RIN 3064-AF71, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.

- **Hand Delivery/Courier:** Comments may be hand-delivered to the guard station at the rear of the 550 17th Street NW building (located on F Street) on business days between 7 a.m. and 5 p.m.

Please include your name, affiliation, address, email address, and telephone number(s) in your comment. All statements received, including attachments and other supporting materials, are part of the public record and are subject to public disclosure. You should submit only information that you wish to make publicly available.

**Please note:** All comments received will be posted generally without change to <https://www.fdic.gov/regulations/laws/federal/>, including any personal information provided.

**FOR FURTHER INFORMATION CONTACT:** Richard M. Schwartz, Counsel, Legal Division, (202) 898-7424; Michael P. Farrell, Counsel, Legal Division, (202) 898-3853, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.

## **SUPPLEMENTARY INFORMATION:**

### **I. Policy Objectives**

Section 18(a)(4) of the Federal Deposit Insurance Act, 12 U.S.C. 1828(a)(4), (Section 18(a)(4)) prohibits any person from misusing the name or logo of the Federal Deposit Insurance Corporation (FDIC) or from engaging in false advertising or making knowing misrepresentations about deposit insurance. The FDIC has observed an

increasing number of instances where financial services providers or other entities or individuals have misused the FDIC's name or logo or have made false or misleading representations that would suggest to the public that these providers' products are FDIC-insured. To provide transparency into how the FDIC will address these and similar concerns, the FDIC is proposing to adopt regulations to further clarify its procedures for identifying, investigating, and where necessary taking formal and informal action to address potential violations of Section 18(a)(4). The regulations would also establish a point-of-contact for receiving complaints about potentially false or misleading representations regarding deposit insurance and would direct depositors and prospective depositors to where they could obtain information or verification about deposit insurance claims. Although the FDIC is not required to promulgate regulations to implement section 18(a)(4), the FDIC nonetheless believes that the proposed rule, if adopted, would establish a more transparent process that will benefit all parties and would promote stability and confidence in FDIC deposit insurance and the nation's financial system.

## **II. Background**

The FDIC has steadfastly and proactively sought to protect depositors and prospective depositors by limiting use of the FDIC's name, seal, and logo to insured depository institutions (IDIs) and preventing false and misleading representations about the manner and extent of FDIC deposit insurance (deposit insurance). Under Federal law, it is a criminal offense to misuse the FDIC name or make false representations regarding deposit insurance.<sup>1</sup> Moreover, the FDIC has independent authority to

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<sup>1</sup> See 18 U.S.C. 709 ("Whoever, except as expressly authorized by Federal law, uses the words 'Federal Deposit', 'Federal Deposit Insurance', or 'Federal Deposit Insurance Corporation' or a combination of any three of these words, as the name or a part thereof under which he or it does business, or advertises or otherwise represents falsely by any device whatsoever that his or its deposit liabilities, obligations, certificates, or shares are insured or guaranteed by the Federal Deposit Insurance Corporation, or by the United States or by any instrumentality thereof, or whoever advertises that his or its deposits, shares, or accounts are federally insured, or falsely advertises or otherwise represents by any device whatsoever the extent to which or the manner in which the deposit liabilities of an insured bank or banks are insured by the

investigate and take administrative enforcement actions, including the power to issue cease and desist orders and impose civil money penalties, against any person who: (1) falsely represents or implies that any deposit liability, obligation, certificate, or share is insured by the FDIC; or (2) otherwise knowingly misrepresents: (a) that any deposit liability, obligation, certificate, or share is insured, or (b) the extent or manner in which any deposit liability, obligation, certificate, or share is insured.<sup>2</sup>

Although the FDIC has broad statutory authority in this area, the FDIC has never issued specific regulations regarding false representations related to FDIC insurance or the misuse of the FDIC's name or logo.

On February 26, 2020, the FDIC published in the *Federal Register* a Request for Information (RFI) related to potential modernization of its signage and advertising rules set out in part 328 of the FDIC regulations.<sup>3</sup> This RFI included the questions tied to the deposit insurance misrepresentation issues discussed in this Notice of Proposed Rulemaking.<sup>4</sup> On March 13, 2020, the FDIC published an extension of the comment period in the *Federal Register*.<sup>5</sup> However, on April 16, 2020, in light of COVID-19, the FDIC announced that it was temporarily postponing its efforts to modify the rules under part 328 of the FDIC regulations.

In light of the increasing number of instances where financial services providers or other entities or individuals have misused the FDIC's name or logo, the FDIC has elected to address false or misleading representation and misuse issues through this

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Federal Deposit Insurance Corporation... Shall be punished... by a fine under this title or imprisonment for not more than one year...").

<sup>2</sup> See 12 U.S.C. 1828(a)(4)(C)-(D). With regard to an insured depository institution under the supervision of another Federal banking agency, the FDIC shall first write to that agency to take enforcement action under section 18(a)(4) against any entity for which the agency is the appropriate Federal banking agency or any institution-affiliated party of such entity; if that agency takes no action within 30 days, the FDIC may take action.

<sup>3</sup> 85 FR 10997 (Feb. 26, 2020).

<sup>4</sup> Id., at 10999-11000.

<sup>5</sup> 85 FR 14678 (Mar. 13, 2020).

Notice of Proposed Rulemaking. Because the FDIC is committed to obtaining input on these issues from the industry and the public, we have included relevant questions in this document.

Separately, on April 9, 2021, the FDIC re-issued its RFI regarding the FDIC Sign and Official Advertising Requirements.<sup>6</sup> The 2021 RFI focuses on soliciting information on the modernization of the FDIC's advertising requirements applicable to IDIs, and related topics. While questions related to misrepresentation and misuse have been removed from that document, there remains a degree of overlap between the RFI and the proposed rule and responses to the RFI may provide information that is relevant to consideration of the proposed rule. For example, the RFI asks about how to deal with parties that may be fraudulently impersonating insured depository institutions, which necessarily overlaps with the proposed rule. Therefore, the FDIC will consider relevant comments submitted in response to the RFI, together with comments submitted in response to the proposed rule, in adopting the final rule.

### **III. Summary of Proposed Regulation**

The proposed regulation establishes a new subpart B to part 328, entitled "False Advertising, Misrepresentation of Insured Status, and Misuse of the FDIC's Name or Logo." The proposed subpart sets forth the process by which the FDIC will identify and investigate conduct that may violate Section 18(a)(4), the standards under which such conduct will be evaluated, and the procedures which the FDIC will follow when formally and informally enforcing the provisions of Section 18(a)(4).

#### *Section 328.100 - Scope*

Section 328.100 notes that, unlike many FDIC regulations, which are binding upon IDIs and institution-affiliated parties (IAPs), this regulation, consistent with the

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<sup>6</sup> 86 FR 18528 (Apr. 9, 2021).

authority set forth in Section 18(a)(4), will apply to any person who violates Section 18(a)(4) or who aids another in such a violation.

#### *Section 328.101 - Definitions*

Section 328.101 sets forth certain definitions that will be used throughout the subpart. Such definitions include, but are not limited to the terms or phrases “non-deposit product,” “uninsured financial product,” “FDIC-associated images,” and “FDIC-associated terms.”

#### *Section 328.102 - Prohibition*

Section 328.102 sets forth the conduct that is prohibited by Section 18(a)(4). It further provides transparency by setting forth the FDIC’s interpretation of the scope of prohibited conduct, including specific examples of conduct that the FDIC deems to violate Section 18(a)(4). The identified practices include instances where false statements are made regarding the existence or extent of deposit insurance associated with a product, as well as instances where material information is omitted from a representation (e.g., where a non-bank third party represents that its products are FDIC-insured without identifying the name or the names of the IDIs where customer deposits will be placed and through whom such insurance is derived.) These examples are not meant to be an exhaustive list, but rather specific examples of the type of conduct that the FDIC has observed that violate the prohibitions in Section 18(a)(4). This list is not intended to be an exhaustive list, and the FDIC may modify the list based on responses to this notice or the RFI.

The section further sets forth certain standards that the FDIC will use to determine if a statement violates Section 18(a)(4). The standards laid out in § 328.102 are adapted from the standards that Federal Trade Commission developed decades ago to determine if acts or practices are deceptive in violation of Section 5 of the Federal Trade Commission

Act, 15 U.S.C. 45 (Section 5).<sup>7</sup> While Section 18(a)(4) is separate from Section 5, it prohibits similar conduct – deception in connection with commerce. The standards governing deception under Section 5 have been consistently accepted by courts,<sup>8</sup> and used by the FTC and other agencies, including the FDIC, which enforces prohibitions of Section 5 against the institutions it supervises and IAPs of those institutions.<sup>9</sup> In light of the long-term use and acceptance of these standards, the FDIC believes it is appropriate to use similar standards to determine if a representation about deposit insurance violates Section 18(a)(4).

Section 328.102 also sets forth a bright-line rule for when the FDIC will presume a misrepresentation to have been knowingly made (i.e., when a respondent continues to make representations about deposit insurance after having been advised by a governmental or regulatory authority that such representations are false or misleading). This bright-line rule is not, however, intended to be the exclusive manner in which the FDIC can establish that any misrepresentation was knowingly made, and the agency reserves the right to establish this statutory element by introducing other evidence.

#### *Section 328.103 – Inquiries and Complaints*

Section 328.103 provides a process by which members of the public may submit complaints to the FDIC regarding suspected false or misleading representations about deposit insurance. It also directs members of the public to the agency’s existing resources to submit inquiries about representations regarding deposit insurance to the FDIC’s Information and Support Center.

The FDIC believes that having a specified point-of-contact for depositors and prospective depositors who may have questions about deposit insurance coverage will be

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<sup>7</sup> See generally, FTC Policy Statement on Deception, October 14, 1983.

<sup>8</sup> See, e.g., *FTC v. Stefanchik*, 559 F.3d 924 (9<sup>th</sup> Cir. 2009).

<sup>9</sup> See, *FIL-57-2002 Unfair or Deceptive Acts – Applicability of the Federal Trade Commission Act* (May 30, 2002) and *FIL-26-2004, Unfair or Deceptive Acts or Practices under Section 5 of the Federal Trade Commission Act* (March 11, 2004).

of particular value to the public given the increasing volume of communication and advertising relating to financial products that members of the public receive over various media, including social media and electronic communication. This process represents a continuation of the Information and Support Center's role of aiding the FDIC's mission of ensuring and promoting the stability and confidence of the banking system by responding to inquiries from the public.

*Section 328.104 - Investigation*

Section 328.104 sets forth procedures for formal investigations into potential violations of Section 18(a)(4). Among other things, the section delegates authority to the FDIC's General Counsel to investigate potential violations and provides that such investigations will be conducted in accordance with section 10(c) of the Federal Deposit Insurance Act<sup>10</sup> and the FDIC's rules governing investigations, which are found in subpart K of the FDIC's Rules of Practice and Procedure.<sup>11</sup> Section 328.104 further provides that, notwithstanding the longstanding confidentiality provisions found in 12 CFR 308.147, in those limited circumstances where there is risk of imminent harm to consumers or depositors, the FDIC may disclose the existence of an investigation under this part that does not involve a bank or a known IAP of a bank. This disclosure authorization, which is a departure from the general practice of maintaining the confidentiality of investigations, is intended to further the FDIC's mission of promoting confidence and stability in the banking system by allowing it to disclose investigations

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<sup>10</sup> 12 U.S.C. 1820(c).

<sup>11</sup> 12 CFR 308.144-150.



into potentially false or misleading representations about deposit insurance where there is a risk of imminent harm to consumers or depositors.

*Section 328.105 – Referral to Appropriate Authority*

Section 328.105 sets forth circumstances under which the FDIC may notify other authorities of potential violations of law that it becomes aware of in connection with a complaint, inquiry, investigation or action under this subpart.

Section 328.105 provides that the FDIC may recommend that another appropriate Federal banking agency take action to enforce Section 18(a)(4) against an IDI that is subject to the authority of that appropriate Federal banking agency or an IAP of such an institution. Such recommendations are authorized by Section 18(a)(4), which also provides that if the appropriate Federal banking agency fails to take action within 30 days, the FDIC may take enforcement action.

Section 328.105 further provides that, in the event the FDIC becomes aware of conduct that potentially violates laws or regulations within the jurisdiction of another regulatory authority, the FDIC may take steps to notify the appropriate authority.

Section 328.105 also provides that, in the event the FDIC becomes aware of conduct that potentially constitutes a criminal violation of 18 U.S.C. 709, the FDIC may, in appropriate circumstances, notify the FDIC Office of the Inspector General or the appropriate criminal law authority.

Finally, § 328.105 contains provisions governing the provision of any records to other regulatory or criminal authorities in connection with notice under the section.

*Section 328.106 – Informal Resolution*

Historically, the FDIC has generally resolved apparent violations of Section 18(a)(4) informally by notifying the party responsible and requesting that the apparent false or misleading representation be withdrawn and corrected. Section 328.106 sets forth the process the FDIC will follow when pursuing an informal resolution. Under this

process, the FDIC will generally send any person that appears to be making a false or misleading representation, or any person aiding or abetting such a representation, an advisory letter notifying the person of the basis for the FDIC's concerns and requesting corrective action. Such letters will also provide the recipient the opportunity to provide the FDIC with supplemental information if the recipient contends that the representations made are true and not misleading and/or that any use of the FDIC's name or logo is authorized.

Examples of the general form such advisory letters may take may be found on the FDIC's public website at <https://www.fdic.gov/regulations/laws/federal/2021/template-advisory-letters.pdf>. Form A-1 provides a template advisory letter for communicating directly with a person that is believed to be misusing the FDIC's name or logo or making false or misleading representations about deposit insurance. Form A-2 provides a template advisory letter for communications directed to a third-party publisher that may be disseminating potentially false or misleading representations regarding deposit insurance. Form A-3 provides a template for communications with internet service providers (ISPs), alerting them that a website hosted by the ISP may be making false representations in violation of Section 18(a)(4).

Generally, the FDIC will only send such advisory letters to an ISP if the website in question contains one or more indicia of fraud. Such indicia would include, among other things, evidence that: (1) the website purports to belong to or be associated with an IDI when the IDI disclaims any ownership or association with the website; (2) the website appears to mirror or look like a valid website maintained by an IDI by spoofing or copying photos or pages from the IDI's website in an attempt to deceive depositors into believing that the website belongs to or is associated with the IDI; (3) the website purports to belong to an IDI, when no such IDI exists; or (4) there are geographic or other

inconsistencies on the site (e.g., the website is hosted abroad or the contact information reflected on the site does not match those on file with the FDIC).

Section 328.106 further provides that if the recipient of such a letter takes the requested corrective action within the time requested, the FDIC will generally take no further action. However, if the recipient fails to timely take corrective action, the FDIC may pursue all remedies available to it. Additionally, pursuant to § 328.106, the FDIC may commence formal enforcement action at any time if the FDIC has reason to believe that depositors or IDIs may suffer harm as a result of continued conduct or if the person making the false or misleading representation has been previously advised of the agency's concerns.

#### *Section 328.107 – Formal Enforcement Action*

Section 328.107 sets forth the procedures that will govern any formal enforcement action brought by the FDIC to enforce the provisions of Section 18(a)(4). Under § 328.107, and as authorized by Section 18(a)(4), the FDIC may bring formal actions to enforce Section 18(a)(4) under section 8 of the Federal Deposit Insurance Act (Section 8)<sup>12</sup> against any person in the same manner and to the same extent that it can bring such actions against insured state nonmember banks and their IAPs.

Section 328.107 authorizes the FDIC General Counsel to bring an action against any person to enforce the provisions of Section 18(a)(4); however, it provides that in the case of an IDI for which another Federal banking agency is the appropriate Federal banking agency, the General Counsel can only commence an action if the appropriate Federal banking agency fails to take action after receiving a recommendation pursuant to § 328.105. It further provides that administrative proceedings brought to enforce Section

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<sup>12</sup> 12 U.S.C. 1818. Specifically, the FDIC is authorized to pursue actions under Section 8(b), (c), (d), or (i) to enforce the provisions of Section 18(a)(4).

18(a)(4) will be governed by the FDIC's Rules of Practice and Procedure set forth in Part 308 of the FDIC's Regulations.

Section 328.107 also sets forth the venue for formal enforcement actions. In the case of actions against IDIs or IAPs, venue will be in the federal judicial district where the home office of the IDI is located. This is consistent with the venue provisions of Section 8. In actions that do not involve IDIs or IAPs, venue will be based on the residence of the respondent, similar to the manner in which venue is determined for general civil actions under 29 U.S.C 1391. The FDIC believes these venue provisions are consistent with existing law and due process.

#### *Section 328.108 – Appeals Process*

Section 328.108 clarifies that any order issued after hearings conducted pursuant to this subpart is subject to judicial review to the same extent as any other order issued under Section 8. While Section 18(a)(4) does not expressly provide for judicial review, it does authorize enforcement actions under Section 8, which provides for such review. The FDIC believes that this grant of authority includes the right to seek judicial review and further believes such right is necessary and appropriate. Section 328.108 also provides that any petitions for judicial review may be filed in the court of appeals for the federal circuit where the hearing was held or the United States Court of Appeals for the District of Columbia Circuit. This venue provision is consistent with the venue provisions of Section 8 and provides respondents with the same choice of venue provided after any other FDIC enforcement hearing.

#### **IV. Expected Effects**

The proposed rule, if adopted, would primarily affect non-bank entities and individuals who are potentially misusing the FDIC's name or logo or are making false or misleading representations about deposit insurance. The FDIC currently insures 5,042

depository institutions<sup>13</sup> that could also be affected; however in practice, the proposed rule would primarily affect non-bank entities and private individuals. Since the adoption of Section 18(a)(4) in 2008, the FDIC has issued only one formal enforcement order against a non-bank entity for misuse of the FDIC's name or logo or for misrepresentations or false advertising in relation to deposit insurance. However, as previously noted the FDIC has observed a recent increase in the number of instances where financial services providers or other entities or individuals have misused the FDIC's name or logo or have made misrepresentations that would falsely suggest to the public that these providers' products are FDIC-insured and been subject to an informal resolution. Between January 1, 2019, and December 31, 2020, the FDIC has worked with non-bank entities to reach informal resolutions regarding the potential misuse of the FDIC's name or logo and/or misrepresentations relation to deposit insurance in at least 165 instances.<sup>14</sup> Based on this experience, the FDIC estimates that the proposed rule, if adopted, would apply to relatively few formal enforcement actions and conservatively estimates that it would affect fewer than 165 informal resolutions with non-bank entities and individuals each year.

As discussed previously, the proposed rule, if adopted, would clarify the FDIC's procedures for evaluating potential violations of Section 18(a)(4). The proposed rule would generally be consistent with existing practices used by the FDIC with respect to these matters. Further the proposed rule, if adopted, would not affect the application of related criminal prohibitions under 18 U.S.C. 709. Therefore, the FDIC believes that the

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<sup>13</sup> FDIC Call Report data, September 30, 2020.

<sup>14</sup> See *FDIC 2019 Annual Report*, p. 38; *FDIC 2020 Annual Report*, p. 47.

proposed rule, if adopted, would be unlikely to have any significant effect on formal and informal enforcement of the Section 18(a)(4) prohibitions.

The FDIC believes that the proposed rule, if adopted, would benefit FDIC-insured institutions and members of the public by further clarifying what constitutes a violation of Section 18(a)(4), by creating a process by which institutions and members of the public can report suspected instances of false advertising, misuse, or misrepresentation regarding deposit insurance, and by establishing clear procedures by which the FDIC will investigate and, where necessary, formally and informally resolve potential violations of Section 18(a)(4). Specifically, the added transparency on the FDIC's processes for investigating potential instances of misuse or misrepresentation and, if needed, resolution are expected to benefit the parties involved by establishing a common understanding of those processes.

## **V. Alternatives**

The FDIC has considered alternatives to the rule but believes that adopting subpart B to part 328 represents the most appropriate option. As discussed previously, Section 18(a)(4) establishes prohibitions against the misuse of the FDIC's name or logo and prohibits misrepresentations and false advertising in relation to deposit insurance. The FDIC considered the status quo alternative of not adopting a regulation that further clarifies what constitutes misuse of FDIC name or logo or false or misleading representation with respect to FDIC insurance, how the FDIC will identify and investigate suspected instances of misuse or misrepresentation, and the process by which the FDIC will pursue formal or informal resolution of instances of misuse or misrepresentation. However, based on the FDIC's recent experience addressing instances of potential and actual misuse, misrepresentation, and false advertising in relation to the FDIC name and logo, the FDIC believes that the proposed rule is the most appropriate action.

## **VI. Request for Comments**

The FDIC invites comments on all aspects of this proposed rulemaking. In particular, the FDIC seeks feedback on the scope of the proposed rule and the procedures described therein, including the following specific questions:

### *False Advertising, Misuse of Logo, and Misrepresentations*

1. Please describe the extent to which the proposed rule sufficiently identifies situations that present potential risks related to false or misleading representations regarding deposit insurance coverage and the misuse of the FDIC's name or logo, including those related to specific products and advertising channels. If there are additional types of false or misleading representations about deposit insurance coverage that may not be effectively captured by the rule, please describe them.
2. Please describe the extent to which the proposed rule sufficiently addresses false or misleading representations regarding deposit insurance and the misuse of the FDIC's name and logo. If there are additional or alternative ways to more effectively or efficiently address such misrepresentations and/or misuse, please describe them.
3. Please describe any suggested additions to the proposed rule for preventing and addressing the risks of false or misleading representations regarding deposit insurance and/or the misuse of the FDIC's name and logo.

### *Procedures for Investigations, Informal Resolution, and Formal Enforcement Actions*

4. Are the proposed complaint and inquiry procedures sufficiently clear about how business entities and members of the public may contact the FDIC if they have questions or concerns relating to potentially false or misleading representations

- regarding deposit insurance or misuse of the FDIC's name and logo? Are there other types of procedures the FDIC should consider? If so, please describe them.
5. Are there other alternative, effective, and efficient methods by which a customer can ensure that a third-party's representations regarding deposit insurance are true and accurate? If so, please describe them.
  6. Is the proposed informal resolution process an adequate means of addressing, in the first instance in most circumstances, potentially false or misleading representations regarding deposit insurance or misuse of the FDIC's name and logo? Should the FDIC consider other or additional procedures? If so, please describe them.
  7. The proposed rule contains a provision that would permit the FDIC, in those limited circumstances where there is risk of imminent harm to consumers or depositors, to confirm the existence of a formal investigation, so long as the target of the investigation was not an IDI or a known IAP thereof. This provision would be an exception to the longstanding confidentiality provisions found in 12 CFR 308.147. Is such an exception appropriate? Does the proposed rule strike an appropriate balance between the need to maintain the confidentiality of investigations involving IDIs and known IAPs, versus the potential value in identifying the existence of investigations into non-bank persons and entities whose conduct may result in risk of imminent harm to consumers and depositors? Are there alternatives the FDIC should consider? If so, please describe them.
  8. Is the formal enforcement action process sufficiently clear, given that Section 18(a)(4) expressly references the use of established enforcement mechanisms set forth



in Section 8 of the FDI Act? Should other provisions be added? If so, please describe them.

9. Do the investigation, informal resolution, and formal enforcement action processes described in the proposed rule strike the appropriate balance between addressing in a timely manner potentially false or misleading representations regarding deposit insurance and allowing the parties identified as potentially participating in the false or misleading representations an opportunity to present additional facts or provide a legal defense?

*Other Areas of Concern*

10. Upon entering into a relationship or arrangement with a third-party non-bank entity, as part of FDIC-insured institutions' due diligence, do such institutions currently take steps to ensure: (a) that the non-bank is aware of existing laws and regulations related to the use of the FDIC's name and logo, and (b) that representations made by the non-bank regarding the insured status of bank products are accurate and comply with existing laws and regulations? If not, are there practices that FDIC-insured institutions could adopt to spread awareness of and compliance with these laws and regulations by non-banks?
11. Are there other topics or issues relating to false or misleading representations regarding deposit insurance or the misuse of the FDIC's name and logo that the FDIC should consider? If so, please describe them and how you think the FDIC should address those topics and issues.

Written comments must be received by the FDIC no later than [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

## **VII. Administrative Law Matters**

### *A. The Regulatory Flexibility Act*

The Regulatory Flexibility Act (RFA), requires that, in connection with a notice of proposed rulemaking, an agency prepare and make available for public comment an initial regulatory flexibility analysis that describes the impact of the proposed rule on small entities.<sup>15</sup> However, a regulatory flexibility analysis is not required if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities, and publishes its certification and a short explanatory statement in the *Federal Register* together with the rule. The Small Business Administration (SBA) has defined “small entities” to include banking organizations with total assets of less than or equal to \$600 million.<sup>16</sup> Generally, the FDIC considers a significant effect to be a quantified effect in excess of 5 percent of total annual salaries and benefits per institution, or 2.5 percent of total noninterest expenses. The FDIC believes that effects in excess of these thresholds typically represent significant effects for FDIC-supervised institutions. For the reasons provided below, the FDIC certifies that the proposed rule, if adopted in final form, would not have a significant economic impact on a substantial number of small banking organizations. Accordingly, a regulatory flexibility analysis is not required.

As of September 30, 2020, the FDIC insured 5,042 depository institutions, of

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<sup>15</sup> 5 U.S.C. 601, *et seq.*

<sup>16</sup> The SBA defines a small banking organization as having \$600 million or less in assets, where an organization’s “assets are determined by averaging the assets reported on its four quarterly financial statements for the preceding year.” *See* 13 CFR 121.201 (as amended, by 84 FR 34261, effective August 19, 2019). “SBA counts the receipts, employees, or other measure of size of the concern whose size is at issue and all of its domestic and foreign affiliates.” *See* 13 CFR 121.103. Following these regulations, the FDIC uses a covered entity’s affiliated and acquired assets, averaged over the preceding four quarters, to determine whether the covered entity is “small” for the purposes of RFA.

which 3,585 are considered small banking organizations for the purposes of RFA.<sup>17</sup>

Potential instances of misuse or misrepresentation of the FDIC name or logo by IDIs are usually addressed under the normal supervisory authority of the appropriate federal financial regulator, therefore although the proposed rule could affect IDIs, in practice the proposed rule would primarily affect non-bank entities and private individuals. Private individuals are not considered “small entities” by the terms of the RFA.<sup>18</sup>

Based on the information above, the FDIC certifies that the proposed rule would not have a significant economic impact on a substantial number of small entities.

The FDIC invites comments on all aspects of the supporting information provided in this RFA section. In particular, would this rule have any significant effects on small entities that the FDIC has not identified?

#### *B. Plain Language*

Section 722 of the Gramm-Leach-Bliley Act<sup>19</sup> requires the federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. The FDIC has sought to present the proposed rule in a simple and straightforward manner. The FDIC invites comments on whether the proposal is clearly stated and effectively organized, and how the FDIC might make the proposal easier to understand.

#### *C. The Economic Growth and Regulatory Paperwork Reduction Act*

Under section 2222 of the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (EGRPRA), the FDIC is required to review all of its regulations, at least once every 10 years, in order to identify any outdated or otherwise unnecessary regulations imposed on insured institutions.<sup>20</sup>

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<sup>17</sup> FDIC Call Report data, September 30, 2020.

<sup>18</sup> How to Comply with the Regulatory Flexibility Act, August 2017, The U.S. Small Business Administration, Office of Advocacy, <https://cdn.advocacy.sba.gov/wp-content/uploads/2019/06/21110349/How-to-Comply-with-the-RFA.pdf>

<sup>19</sup> Pub. L. 106-102, section 722, 113 Stat. 1338, 1471 (1999).

<sup>20</sup> Pub. L. 104-208, 110 Stat. 3009 (1996).

*D. Riegle Community Development and Regulatory Improvement Act of 1994*

Pursuant to section 302(a) of the Riegle Community Development and Regulatory Improvement Act (RCDRIA),<sup>21</sup> in determining the effective date and administrative compliance requirements for new regulations that impose additional reporting, disclosure, or other requirements on IDIs, each Federal banking agency must consider, consistent with principles of safety and soundness and the public interest, any administrative burdens that the regulations would place on depository institutions, including small depository institutions, and customers of depository institutions, as well as the benefits of the regulations. In addition, section 302(b) of RCDRIA requires new regulations and amendments to regulations that impose additional reporting, disclosures, or other new requirements on IDIs generally to take effect on the first day of a calendar quarter that begins on or after the date on which the regulations are published in final form.<sup>22</sup> The FDIC invites comments that further will inform its consideration of RCDRIA.

**List of Subjects in 12 CFR Part 328**

Advertising, Bank deposit insurance, Savings associations, Signs and symbols.

**Authority and Issuance**

For the reasons stated in the preamble, the Federal Deposit Insurance Corporation proposes to amend 12 CFR part 328 as follows:

1. Revise the heading for part 328 to read as follows:

**PART 328—ADVERTISEMENT OF MEMBERSHIP, FALSE ADVERTISING,  
MISREPRESENTATION OF INSURED STATUS, AND MISUSE OF THE  
FDIC’S NAME OR LOGO**

2. Revise the authority citation for part 328 to read as follows:

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<sup>21</sup> 12 U.S.C. 4802(a).

<sup>22</sup> *Id.*

**Authority:** 12 U.S.C. 1818, 1819 (Tenth), 1820(c), 1828(a).

3. Add new subpart A of part 328 entitled “Subpart A—Advertisement of Membership.”
4. Redesignate §§ 328.0 through 328.4 as subpart A of part 328.
5. Reserve §§ 328.5 through 328.99.
6. Add a new part 328, subpart B to read as follows:

**Subpart B—False Advertising, Misrepresentation of Insured Status, and Misuse of the FDIC’s Name or Logo.**

Sec.	
328.100	Scope
328.101	Definitions
328.102	Prohibition
328.103	Inquiries and Complaints
328.104	Investigations of Potential Violations
328.105	Referral to Appropriate Authority
328.106	Informal Resolution
328.107	Formal Enforcement Actions
328.108	Appeals Process

**Subpart B— False Advertising, Misrepresentation of Insured Status, and Misuse of the FDIC’s Name or Logo**

**§ 328.100 Scope.**

This Subpart applies to any person who: (1) falsely represents, expressly or by implication, that any deposit liability, obligation, certificate, or share is FDIC-insured by using the FDIC’s name or logo; (2) knowingly misrepresents, expressly or by implication, that any deposit liability, obligation, certificate, or share is insured by the FDIC if such an item is not so insured; (3) knowingly misrepresents, expressly or by implication, the extent to which or the manner in which any deposit liability, obligation, certificate, or share is insured by the FDIC, if such an item is not insured to the extent or manner represented; or (4) aid or abets another in any of the foregoing.

**§ 328.101 – Definitions.**

For purposes of this subpart:

- (a) **Advertisement** means a commercial message, in any medium, that is designed to attract public attention or patronage to a product, business, or service.
- (b) **Appropriate Federal Banking Agency** has the meaning set forth in section 3(q) of the FDIC (12 U.S.C. 1813(q)).
- (c) **FDIA** means the Federal Deposit Insurance Act, 12 U.S.C. 1811 *et seq.*
- (d) **FDIC** means the Federal Deposit Insurance Corporation.
- (e) **FDIC-Associated Images** means the Seal of the FDIC, alone or within the letter C of the term FDIC; the Official Sign and Symbol of the FDIC, as set forth in 12 CFR 328.1; the Official Advertising Statement, as set forth in 12 CFR 328.3(b); any similar images; and any other signs and symbols that may represent or imply that any deposit, liability, obligation certificate, or share is insured or guaranteed by the FDIC.
- (f) **FDIC-Associated Terms** means the abbreviation, “FDIC,” and the following words or phrases: “Federal Deposit Insurance Corporation,” “Federal Deposit,” “Federal Deposit Insurance,” “FDIC-insured,” “FDIC insurance,” “insured by FDIC,” “member FDIC;” any similar words or phrases; or any other terms that may represent or imply that any deposit, liability, obligation certificate, or share is insured or guaranteed by the FDIC.
- (g) **Federal Banking Agency** has the meaning set forth in section 3(z) of the FDIC (12 U.S.C. 1813(z)).
- (h) **General Counsel** means the General Counsel of the FDIC or his or her designee.
- (i) **Hybrid Product** has the same meaning as set forth under 12 CFR 328.3(e)(1)(ii).
- (j) **Institution-Affiliated Party (IAP)** has the same meaning as set forth under section 3(u) of the FDIA, 12 U.S.C. 1813(u).
- (k) **Insured Deposit** has the same meaning as set forth under section 3(m) of the FDIA, 12 U.S.C. 1813(m).
- (l) **Insured Depository Institution** has the same meaning as set forth under section

3(c)(2) of the FDIA, 12 U.S.C. 1813(c)(2).

(m) ***Non-Deposit Product*** has the same meaning as set forth under 12 CFR

328.3(e)(1)(i).

(n) ***Person*** means a natural person, sole proprietor, partnership, corporation, unincorporated association, trust, joint venture, pool, syndicate, agency or other entity, association, or organization, including a Regulated Institution as defined in paragraph (o) of this section.

(o) ***Regulated Institution*** means any institution for which the FDIC, the Office of the Comptroller of the Currency, or the Board of Governors of the Federal Reserve System is the “appropriate Federal banking agency” under section 3(q) of the FDIA, 12 U.S.C. 1813(q).

(p) ***Third-Party Publisher*** means any party that publishes, places, distributes, or circulates advertising or marketing materials, regardless of the platform or media used for distribution, containing FDIC-Associated Images, FDIC-Associated Terms, or other claims regarding FDIC insurance or guarantees. Third-Party Publishers shall include, but not be limited to: publishers and distributors of written, visual, or print advertising; broadcasters of video or audio advertisements; telemarketers; internet or web-based distributors, including internet service providers, and email marketers; and direct mail marketers and distributors.

(q) ***Uninsured Financial Product*** means any Non-Deposit Product, Hybrid-Product, investment, security, obligation, certificate, share, or financial product other than an “Insured Deposit” as defined in paragraph (k) of this section.

## **§ 328.102 – Prohibition.**

(a) *Use of the FDIC Name or Logo.*

(1) No person may represent or imply that any Uninsured Financial Product is

insured or guaranteed by the FDIC by using FDIC-Associated Terms as part of any business name or firm name of any person;

(2) No person may represent or imply that any Uninsured Financial Product is insured or guaranteed by the FDIC by using FDIC-Associated Terms or by using FDIC-Associated Images as part of an Advertisement, solicitation, or other publication or dissemination.

(3) This subsection applies, but is not limited, to:

- (i) An Advertisement for any Uninsured Financial Product which feature or include one or more FDIC-Associated Terms or FDIC-Associated Images, without a clear, conspicuous, and prominent disclaimer that the products being offered are not FDIC insured or guaranteed;
- (ii) An Advertisement for any Uninsured Financial Product which may be backed or guaranteed by an entity other than the FDIC, but which feature or include one or more FDIC-Associated Terms or FDIC-Associated Images, without a clear, conspicuous, prominent, and accurate explanation as to the actual nature and source of the guarantee;
- (iii) An Advertisement for any Non-Deposit Product or Hybrid Product by a Regulated Institution which include any statement or symbol which implies or suggests the existence of Federal deposit insurance relating to the Non-Deposit product or Hybrid Product;
- (iv) Publication or dissemination of information, regardless of the media or platform, that suggests or implies that the party making the representation is an FDIC-insured institution if this is not in fact true.
- (v) Publication or dissemination of information, regardless of the media or platform, that suggests or implies that the party making the representation is



associated with an FDIC-insured institution if the nature of the association is not clearly, conspicuously, prominently, and accurately described.

(vi) Publication or dissemination of information, regardless of the media or platform, that suggests or implies that the party making the representation is the FDIC or any office, division, or subdivision thereof, if this is not in fact true.

(vii) Publication or dissemination of information, regardless of the media or platform, that suggests or implies that the party making the representation is associated with the FDIC or any office, division, or subdivision thereof, if the nature of the association is not clearly, conspicuously, prominently, and accurately described.

*(b) False or Misleading Representations regarding FDIC Insurance.*

(1) No person may knowingly make false or misleading representations about deposit insurance, including:

- (i) that any deposit liability, obligation, certificate, or share is insured, under this subpart, if such a deposit is not so insured;
- (ii) the extent to which any deposit liability, obligation, certificate, or share is insured under this subpart, if such item is not insured to the extent represented; or
- (iii) the manner in which any deposit liability, obligation, certificate, or share is insured under this subpart, if such item is not insured in the manner represented.

(2) For the purposes of this subsection, a statement is deemed to be a statement regarding deposit insurance, if it:

- (i) includes any FDIC-Associated Images or FDIC-Associated Terms;

- (ii) makes any representation, suggestion, or implication about the existence of FDIC insurance or the extent or manner of coverage; or
- (iii) makes any representation, suggestion, or implication about the existence, extent, or effectiveness of any guarantee by FDIC in the event of financial distress by Insured Depository Institutions, whether a specific Insured Depository Institution or Insured Depository Institutions generally, including but not limited to bank failure, insolvency, or receivership of such institutions.

(3) For the purposes of this subsection, a statement regarding deposit insurance violates this section, if:

- (i) the statement contains any material representations which would have the tendency or capacity to mislead a reasonable consumer, regardless of whether any such consumer was actually misled; or
- (ii) the statement omits material information which would be necessary to prevent a reasonable consumer from being misled, regardless of whether any such consumer was actually misled. Where such a statement is made by a person other than an Insured Depository Institution, failure to identify the name(s) of the Insured Depository Institution(s) that will be receiving the deposits is deemed a material omission.

(4) Without limitation, a false or misleading representation is deemed to be material if it states, suggests or implies that:

- (i) Uninsured Financial Products are insured or guaranteed by the FDIC;
- (ii) Insured Deposits (whether generally or at a particular Regulated Institution) are not insured or guaranteed by the FDIC;
- (iii) the amount of deposit insurance coverage is different (whether greater or less) than actually provided under the FDIA;

- (iv) the circumstances under which deposit insurance may be paid are different than actually provided under the FDIA;
  - (v) the requirements to qualify for deposit insurance, or the process by which deposit insurance would be paid, are different from what is provided under the FDIA and its implementing regulations, including false or misleading claims related to actions required of depositors to qualify for or obtain such insurance; or
  - (vi) Regulated Institutions may convert Insured Deposits into another form of liability that is not insured, such as unsecured debt or equity.
- (5) Without limitation, a representation is deemed to have been knowingly made if the person making the representation:
- (i) has made false or misleading representations regarding deposit insurance;
  - (ii) has been advised by the FDIC in an advisory letter, as provided in § 328.106(a) or has been advised by another governmental or regulatory authority, including, but not limited to, another Federal banking agency, the Federal Trade Commission, the U.S. Department of Justice, or a state bank *supervisor*, that such representations are false or misleading; and
  - (iii) thereafter, continues to make these, or substantially-similar, representations.

### **§ 328.103 – Inquiries and Complaints.**

Should any person have reason to believe that anyone is or may be acting in violation of section 18(a) of the FDIA (12 U.S.C. 1828(a)) or this subpart, or have questions regarding the accuracy of deposit-related representations, such individuals may contact the FDIC at the FDIC Information and Support Center,

<https://ask.fdic.gov/fdicinformationandsupportcenter/s/>, or by telephone at: 1-877-275-

**§ 328.104 – Investigations of Potential Violations**

- (a) The General Counsel shall have delegated authority to investigate potential violations of section 18(a) of the FDIA (12 U.S.C. 1828(a)) and this subpart.
- (b) Such investigations will be conducted as prescribed under section 10(c) of the FDIA (12 U.S.C. 1820(c)) and subpart K of part 308 of the FDIC's Rules of Practice and Procedure (12 CFR 308.144-150). Notwithstanding the general confidentiality provisions of 12 CFR 308.147, in cases which may pose a risk of imminent harm to consumers or depositors, the FDIC may disclose or confirm the existence of an investigation that does not involve an Insured Depository Institution or a known IAP thereof. Such disclosure shall not disclose any information obtained or uncovered during the course of the investigation.

**§ 328.105 – Referral to Appropriate Authority.**

- (a) If, in connection with the receipt of an inquiry or complaint, or during the course of an investigation, informal resolution, or formal enforcement under this subpart:
  - (1) the FDIC becomes aware of conduct by a Regulated Institution for which another Federal banking agency is the appropriate Federal banking agency or an Institution-Affiliated Party of such an institution, that appears to violate section 18(a) of the FDIA (12 U.S.C. 1828(a)), the FDIC may recommend that the appropriate Federal banking agency take appropriate enforcement action. If the appropriate Federal banking agency does not take the recommended action within 30 days, the FDIC may pursue any and all remedies available under section 18(a) or the FDIA (12 U.S.C. 1828(a)) and this subpart;

- (2) the FDIC becomes aware of conduct that the FDIC has reason to believe violates a civil law or regulations within the jurisdiction of another regulatory authority, the FDIC may take steps to notify the appropriate authority; and
- (3) the FDIC becomes aware of conduct that the FDIC has reason to believe violates 18 U.S.C. 709, the FDIC may notify FDIC's Office of Inspector General for referral to the appropriate criminal law enforcement authority.
- (b) To the extent that any records are provided to a regulatory or criminal law enforcement authority, as set forth in paragraph (a), of this section, the provision of such records will be made in accordance with the requirements of part 309. Where such records were obtained during the course of an investigation, informal resolution, or formal enforcement action, the General Counsel shall be considered the Director of the Corporation's Division having primary authority over records so obtained.

#### **§ 328.106 – Informal Resolution**

- (a) If the FDIC has reason to believe that any person may be misusing an FDIC-associated image or FDIC-associated term or otherwise violating § 328.102(a), or may be making false or misleading representations regarding deposit insurance in violation of § 328.102(b), the FDIC may issue an advisory letter to such a person and/or any person who aids or abets another in such conduct, including any Third-Party Publisher. Generally, such an advisory letter will:
- (1) Alert the recipient of advisory letter of the basis for the FDIC's concerns;
  - (2) Request that the person and/or Third-Party Publisher:
    - (i) take reasonable steps to prevent any violations of section 18(a) of the FDIA (12 U.S.C. 1828(a)) and this subpart;
    - (ii) commit in writing to refrain from such violations in the future; and

(iii) notify the FDIC in writing that the identified concerns have been fully addressed and remediated; and

- (3) Offer the person or Third-Party Publisher the opportunity to provide additional information, documentation, or justifications to substantiate the representations made or otherwise refute the FDIC's expressed concerns.
- (b) Except in cases where the FDIC has reason to believe that consumers or Insured Depository Institutions may suffer harm arising from continued violations, recipients of advisory letters described in paragraph (a) of this section, shall be provided not less than fifteen (15) days to provide the requested commitment, explanation, or justification.
- (c) Where a recipient of an advisory letter described in paragraph (a) of this section, provides the FDIC with the requested written commitments within the timeframe specified in the letter, and where any required remediation has been verified by FDIC staff, the FDIC will generally take no further administrative enforcement against such a party under § 328.107.
- (d) Where a recipient of an advisory letter described in paragraph (a) of this section, fails to respond to the letter; fails to make the requested commitments; or fails to provide additional information, documentation, or justifications that the FDIC, in its discretion, finds adequate to substantiate the representations made or otherwise refute the concerns set forth in the advisory letter, the FDIC may pursue all remedies set forth in this subpart.
- (e) Nothing in this section shall prevent the FDIC from commencing a formal enforcement action under § 328.107 at any time before or after the issuance of an advisory letter under this section if:
- (1) the FDIC has reason to believe that consumers or Insured Depository Institutions may suffer harm arising from continued violations; or

- (2) the person to whom such an advisory letter would be sent has previously received a similar advisory letter from the FDIC under § 328.106(a).

**§ 328.107 – Formal Enforcement Actions.**

- (a) *Enforcement Authority* - For the purpose of enforcing the requirements of Section 18(a)(4) of the FDIA (12 U.S.C. 1818(a)(4)), the General Counsel is authorized to bring administrative enforcement actions against any person under sections 8(b), (c), (d), and (i) of the FDIA (12 USC 1818(b), 1818(c), 1818(d), and 1818(i)), in the same manner and to the same extent as with respect to a state nonmember insured bank. In the case of conduct by a Regulated Institution for which another Federal banking agency is the appropriate Federal banking agency or an institution-affiliated party of such an institution, the General Counsel may not bring an enforcement action under this subpart unless the FDIC has provided the appropriate Federal banking agency with notice as set forth in section 105(a)(1) of this subpart and the appropriate Federal banking agency failed to take the recommended action.
- (b) *Venue* - Unless the person who is the subject of the enforcement action consents to a different location, the venue for an administrative action commenced under Section 18(a)(4) of the FDIA (12 U.S.C. 1818(a)(4)), shall be as follows:
- (1) In a case where the person who is the subject of the action is an Insured Depository Institution or an IAP of an Insured Depository Institution, in the federal judicial district or territory in which the home office of the Insured Depository Institution is located;
- (2) In a case where the person who is the subject of the action is not an Insured Depository Institution or an IAP of an Insured Depository Institution, the federal judicial district or territory where the person who is the subject of the action resides, if the subject resides in the United States. If the subject of the action does

not reside in the United States, the venue shall be where the subject of the action conducts business or the federal judicial district for the District of Columbia.

- (3) For the purposes of paragraph (1) of this section, a natural person is deemed to reside in the federal judicial district where the natural person is domiciled. A person other than a natural person is deemed to reside in the federal judicial district where it is headquartered or has its principal place of business.
- (c) *Rules of Practice and Procedure.* All actions brought and maintained under this section will be subject to the FDIC's Rules of Practice and Procedure, Subparts A - C of Part 308 (12 CFR 308.1 – 308.109).

**§ 328.108 –Appeals Process.**

- (a) A person who is the subject of a final order issued after an administrative action commenced pursuant to this subpart may obtain judicial review of such order in accordance with the procedures set forth in section 8(h)(2) of the FDIA (12 U.S.C. 1818(h)(2)).
- (b) Petitions for review under this section may be filed in the court of appeals for the circuit where the hearing was held or the United States Court of Appeals for the District of Columbia Circuit.

Federal Deposit Insurance Corporation.

By order of the Board of Directors.

Dated at Washington, DC, on April 21, 2021.

**James P. Sheesley,**

*Assistant Executive Secretary.*

**BILLING CODE 6714-01-P**



